No. 95 -

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.*,

*Petitioners,*

v.

JOHN DOE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## APPENDIX

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April 17, 1996

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
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| DR JOHN DOE, PHD., and all others similarly situated<br><br>Plaintiffs-Appellants,<br><br>vs<br><br>LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director,<br><br>Defendants<br><br>and<br>THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,<br><br>Defendants-Appellee | ) | C 92-2284 SAW |

Filed September 11, 1995

JUDGES Before: Herbert Y. C. Choy, William C. Canby, Jr. and Thomas G. Nelson, Circuit Judges. Opinion by Judge Choy; Dissent by Judge Canby.

CHOY, Circuit Judge:

Appellant, Dr. John Doe, Ph.D. ("Doe"), on behalf of himself and all others similarly situated, appeals the district court's dismissal of his breach of contract claim against the Regents of the

University of California ("University") and his § 1983 claim against John Nuckolls ("Nuckolls"), director of the Lawrence Livermore National Laboratory ("Laboratory") which is owned by the United States Department of Energy ("Department") and is operated by the University.

Doe is a mathematical physicist who signed an employment contract with the Laboratory. Doe contends that the Laboratory wrongfully refused to perform the contract of employment by peremptorily determining that Doe could not obtain a security clearance from the Department. The district court dismissed Doe's breach of contract claim against the Laboratory and the University because it held that the Laboratory and the University, as arms of the state, were immune from suit in federal court under the Eleventh Amendment. Doe appeals the district court's decision to grant Eleventh Amendment immunity to the University, as manager of the Laboratory.

Doe also appeals the district court's dismissal of his *42 U.S.C. § 1983* claim against Nuckolls, in his official capacity, and seeks reconsideration of his application for employment at the Laboratory without reference to security clearance matters. The district court dismissed the § 1983 claim because it determined that Nuckolls was not a "person" under § 1983 and thus was not liable for Doe's claim which sought relief solely for a violation alleged to have occurred in the past.

Having jurisdiction under *28 U.S.C. § 1291*, we reverse the district court's dismissal of Doe's breach of contract claim. We hold that the Eleventh Amendment does not immunize the University from suit in federal court because the University is not an "arm of the state" in this specific instance. We also reverse the dismissal of Doe's § 1983 claim against Nuckolls, in his official capacity, because Nuckolls is a "person" under § 1983 and is liable to suit for retrospective relief. We need not address the issue of whether reconsideration of Doe's employment constitutes prospective injunctive relief but remand to the district court for further proceedings in accordance with our holding.



## I

Doe is a mathematical physicist who received his Ph.D. from Harvard University in 1981. The Laboratory is a facility operated by the University under contract with the Department. Although the University controls all employment matters at the Laboratory, the Department exclusively handles security clearances for Laboratory employees.

Doe allegedly accepted the Laboratory's written offer of employment as a physicist in mid-June, 1991. The employment offer included a salary of $6,100 per month and required Doe to obtain a "Q" security clearance from the Department in a reasonable period of time after he became an employee of the Laboratory. Doe alleges that shortly after he accepted the employment offer, the Laboratory attempted to withdraw the offer, claiming that Doe could not obtain the required security clearance from the Department.

The contract between the United States of America ("Government") and the University for the management and operation of the Laboratory specifies that the Department, rather than the University, will pay the costs of any judgment rendered against the University in performing the contract, including all costs involved in litigation. Modification No. M205, Supplemental Agreement to Contract No. W-7405-ENG-48 ("Contract").

On June 18, 1992, Doe filed his initial complaint against the University, its president, David Gardner ("Gardner"), the Laboratory, and its director, Nuckolls.[1] The complaint contained a claim for breach of employment contract against the Laboratory,

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[1] The Department, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs) were also listed as defendants but were later dismissed with prejudice by stipulation on November 25, 1992.

the University, Gardner, and Nuckolls. In addition, the complaint contained a § 1983 claim against the Laboratory, the University, and Nuckolls and Gardner, in their official capacities, alleging deprivation of due process of law because unqualified personnel at the Laboratory peremptorily determined eligibility for a "Q" security clearance in violation of federal security clearance regulations. Finally, the complaint contained a claim for failure to enforce security regulations. On October 22, 1992, Doe amended his complaint to add allegations suing Nuckolls and three additional employees of the University, all in their individual capacities, for violation of § 1983.

On December 9, 1992, the defendants moved to dismiss Doe's § 1983 claim on the ground that the University and the Laboratory, as arms of the State, and Gardner and Nuckolls, in their official capacities, are not "persons" within the meaning of § 1983. In addition, the defendants sought to dismiss the three newly-added University employees and Nuckolls, in his individual capacity, on the ground that the statute of limitation period had run. Finally, Gardner and Nuckolls moved to dismiss Doe's breach of contract claim on the ground that neither was alleged to be party to the employment contract.

On February 5, 1993, the district court dismissed all claims against Gardner, the breach of contract claim against Nuckolls, and the § 1983 claim against the University, the Laboratory, the three University employees, and Nuckolls, in his official capacity. In its order, however, the district court noted that a plaintiff may assert a § 1983 claim against a state official, acting in her official capacity, if the plaintiff seeks prospective injunctive relief. Doe's breach of contract claim against the University and the Laboratory, and his § 1983 claim against Nuckolls, in his individual capacity, survived.

On April 7, 1993, Doe filed a second amended complaint which contained two claims. The first claim, against the Laboratory and the University, alleged breach of employment contract. Doe also brought a § 1983 claim, seeking declaratory



and prospective injunctive relief, against the University, the Laboratory, and Nuckolls, in his official and individual capacities. Finally, the second amended complaint added class action allegations.

On May 10, 1993, the defendants moved to dismiss Doe's breach of contract claim against the University and the Laboratory on the ground that they were immune from suit under the Eleventh Amendment. In addition, the defendants moved to dismiss Doe's renewed § 1983 claim against the University and the Laboratory on the ground that neither is a "person" within the meaning of § 1983. Finally, the defendants moved to dismiss Doe's § 1983 claim against Nuckolls, in his official capacity, insofar as the claim was based upon alleged past violations of law because Nuckolls is not a "person" for such retrospective § 1983 relief.

On June 24, 1993, the district court granted the motion to dismiss all aspects relevant to this appeal. The district court dismissed the breach of contract claim against the University and the Laboratory on Eleventh Amendment ground. The district court also dismissed the § 1983 claim against the University and the Laboratory, noting that the same claim already had been dismissed in its February 5, 1993 order. Finding that the relief Doe sought - reconsideration of his employment application - did not constitute prospective injunctive relief, the district court dismissed Doe's § 1983 claim against Nuckolls in his official capacity. The district court entered a final judgment on September 16, 1993, and Doe timely filed a notice of appeal on September 22, 1993.

## II

Doe contends that the district court erred when it dismissed his breach of employment contract claim against the University, as manager of the Laboratory, on the ground that the Eleventh Amendment of the United States Constitution grants the University immunity from suit in federal court. A determination of a state's immunity from suit under the Eleventh Amendment is a question

of law which is reviewed *de novo*. *BV Eng'g v. University of Cal., L.A., 858 F.2d 1394, 1395 (9th Cir. 1988)*, cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989)*.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The United States Supreme Court has extended the reach of the Eleventh Amendment to bar federal courts from presiding over any suit in which a state or "arm of the state" is a defendant. *State Highway Comm'n v. Utah Constr. Co., 278 U.S. 194, 199, 73 L. Ed. 262, 49 S. Ct. 104 (1929)*. However, "not all state-created or state-managed entities are immune from suit in federal court. . . . an entity may be organized or managed in such a way that it does not qualify as an arm of the state entitled to sovereign immunity." *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991)*.

We apply a five-factor analysis to determine whether the University, acting in a managerial capacity for the Laboratory, is an arm of the state and thus entitled to Eleventh Amendment immunity from suit in federal court. *See Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1988)* (considering the source of funding for California state colleges and universities to determine whether they are protected by Eleventh Amendment immunity), cert. denied, *490 U.S. 1081 (1989)*. The five factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.



*ITSI TV Prods. v. Agricultural Ass'ns, 3 F.3d 1289, 1292 (9th Cir. 1993)*.

State liability for money judgment is the single most important factor in determining whether an entity is an arm of the state. *Durning, 950 F.2d at 1424*. We must evaluate "whether a judgment against the defendant entity under the terms of the complaint would have to be satisfied out of the limited resources of the entity itself or whether the state treasury would also be legally pledged to satisfy the obligation." Id. We conclude that this factor weighs against granting the University Eleventh Amendment immunity from suit in federal court. The Contract makes clear that the Department, and not the State of California, is liable for any judgment rendered against the University in its performance of the Contract. "When a state entity is structured so that its obligations are its own special obligations and not general obligations of the state, that fact weighs against a finding of sovereign immunity under the arm of the state doctrine . . . ." *Id. at 1425-26*.

The second factor, whether the University performs central government functions, weighs in favor of finding that the University is an arm of the state and granting it Eleventh Amendment immunity. In analyzing this factor, we look at the overall function of the University and not merely to the specific function it performs in relation to the Laboratory. *See id.* at 1426. We look to the way California law treats the University in order to assess whether the University performs central government functions. *Id. at 1423*. The California State Attorney General has stated that the University is "a branch of the state government equal and coordinate with the Legislature, the judiciary, and the executive." *30 Ops. Cal. Att'y Gen. 162, 166 (1957)*. California case law also clearly recognizes the University as a branch of the state government. See *Ishimatsu v. Regents of*

*Univ. of Cal., 266 Cal. App. 2d 854, 72 Cal. Rptr. 756, 762-63 (Cal. Ct. App. 1968); Regents of Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 143 Cal. Rptr. 276, 279 (Cal. Ct. App. 1978).* Finally, the California Education Code defines the University's mission, accords the University with exclusive jurisdiction over education in certain professions, and allocates to it the primary responsibility for "state-supported academic . . . research." Cal. Educ. Code § 66010.4(c) (West Supp. 1995). The regulation of public education is an important central government function, thus the second factor weighs in favor of granting immunity to the University.

The University is not entitled to Eleventh Amendment immunity, however, because the remaining factors, in addition to the first and most important factor, weigh against a finding of immunity. The third factor weighs against immunity because the California Constitution grants the University "the power to sue and be sued." Cal. Const. art. 9, § 9(f). The fourth factor, whether the entity may take property in its own name, also weighs against immunity. The University is vested "with the legal title and the management and disposition of the property of the university" and is given the "power to take and hold, either by purchase or by donation, . . . all real and personal property for the benefit of the university." Id. Finally, the fifth factor weighs against immunity because the California Constitution establishes a "corporation known as 'The Regents of the University of California.'" Cal. Const. art. 9, § 9(a).

The district court erred when it relied upon *Thompson v. City of L.A., 885 F.2d 1439, 1443 (9th Cir. 1989)* (holding that the University was immune from a civil rights suit in federal court where the State of California would have been ultimately responsible for payment of the judgment) and *Jackson v. Hayakawa, 682 F.2d 1344, 1350 (9th Cir. 1982)* (stating in dictum, that the University was an instrumentality of the state), to rule that the University is always immune from suit in federal court.



The district court should have applied the five-factor analysis to this unique situation in which the Department, and not the State of California, pays for any judgment rendered against the University in its management of the Laboratory. It is true that the University has been granted Eleventh Amendment immunity in a number of cases. See, e.g., *Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 257, 79 L. Ed. 343, 55 S. Ct. 197 (1934); Thompson, 885 F.2d at 1443; B.V. Eng'g, 858 F.2d at 1395* (citing *Jackson, 682 F.2d at 1350); Vaughn v. Regents of the Univ. of Cal., 504 F. Supp. 1349, 1351-54 (E.D. Cal. 1981).* However, previous grants of immunity in contexts where the State of California is financially responsible for the University do not automatically translate into immunity in this unique situation. *Vaughn, 504 F. Supp. at 1352-54* (examining the pertinent factors as they relate to the University in order to determine whether the University is entitled to Eleventh Amendment immunity, rather than blindly asserting immunity).

The University is an enormous entity which functions in various capacities and which is not entitled to Eleventh Amendment immunity for all of its functions. See, e.g. *Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931, 940 (Fed. Cir. 1993)* (recognizing that Congress has abrogated the University's immunity from suit in federal court for violation of patent law), cert. denied, *114 S. Ct. 1126 (1994); In re Holoholo, 512 F. Supp. 889, 901-02 (D. Haw. 1981)* (finding that the University waived its Eleventh Amendment immunity by signing a government contract that contemplated possible suits against it in federal court and by entering into a federally regulated area), superseded by statute, not in relevant part, as stated in, *Bator v. Judiciary, Adult Probation Div., 1992 U.S. Dist. LEXIS 22214* (D. Haw. May 20, 1992). The source of funding in each situation, in addition to the four other factors for determining Eleventh Amendment immunity, must be examined closely to ascertain that the University is indeed functioning as an arm of the state.

The University argues that the district court in *Holoholo, 512 F. Supp. at 895,* held that the University is an arm of the state despite an indemnification provision similar to the one in the Contract in this case. The district court in that case held that "since the [University] depends upon appropriations by the California Legislature, any damages awarded against the [University] would, absent insurance or other indemnification, come from the state treasury." *Id. at 895* (emphasis added). In making that statement, the district court had not considered the specific indemnification provision in the contract between the University and the United States and later acknowledged that "the exact nature and extent of the indemnification are not clear[,]" but that the indemnification provision "could render the Eleventh Amendment inapplicable to these state defendants [including the University]." *Id. at 899 n.14.*

After applying the five-factor analysis, we find that the University, acting in a managerial capacity for the Laboratory, has not satisfied the burden of proving that it is entitled to Eleventh Amendment immunity. Because we hold that the University, in this specific instance, is not entitled to Eleventh Amendment immunity from suit in federal court, we need not address whether the University has waived or Congress has abrogated the University's immunity. See *BV Eng'g, 858 F.2d at 1396.*

III

Doe next contends that the district court erred when it dismissed his § 1983 claim against Nuckolls, in his official capacity. We have determined that the University is not protected by the Eleventh Amendment from suit in federal court because the University, in this particular instance, is not functioning as an arm of the state. Because we hold that the University is not an arm of the state in this instance, it is a "person" under § 1983. See *Will v. Michigan Dep't of State Police, 491 U.S. 58, 70, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989);* see also *Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652, 654* (N.J.), cert. denied, *488 U.S. 826*



*(1988).* Nuckolls, acting as the director of the University-managed Laboratory, is therefore not a state official but a "person" who is fully liable under § 1983. See *Thompson, 885 F.2d at 1442-43* ("only those governmental entities which are 'persons' within the meaning of § 1983 can be held liable under § 1983.").

Because we hold that the University and Nuckolls, acting in his official capacity, are fully liable to suit under § 1983, we need not address the question of whether reconsideration of Doe's employment by the Laboratory constitutes prospective injunctive relief. Doe may sue both the University and Nuckolls in federal court regardless of whether the relief he seeks constitutes prospective or retrospective relief. We remand to the district court for further proceedings in accordance with our ruling. We deny Doe's request for attorney's fees because the defendants brought forth a legitimate argument on the basis of Eleventh Amendment immunity.

REVERSED and REMANDED.

CANBY, Circuit Judge, dissenting:

With all respect to the majority, I disagree with its conclusion that the Eleventh Amendment does not bar this action against the University and its officers acting in their official capacities.

As the majority opinion recognizes, we have previously held that the University of California is an arm of the California State Government entitled to Eleventh Amendment immunity from suit in federal court. E.g., *Thompson v. City of Los Angeles, 885 F.2d 1439, 1443 (9th Cir. 1989)* ("It has long been established that UC is an instrumentality of the state for purposes of the Eleventh Amendment"); *BV Engineering v. Univ. of Calif., Los Angeles, 858 F.2d 1394, 1395 (9th Cir. 1988),* cert. denied, *489 U.S. 1090, 103 L. Ed. 2d 859, 109 S. Ct. 1557 (1989).* In my view, these cases are controlling, and there is no call to reassess

the status of the University in the absence of a change in its structure. If the University is the defendant, and judgment is sought against the University, the case may not be brought in federal court unless the immunity has been waived. *BV Engineering, 858 F.2d at 1396.*

The majority, however, does decide anew the question of the University's immunity. In so doing, it reaches an incorrect result. The majority applies a five-factor test that originated in *Mitchell v. Los Angeles Community College District, 861 F.2d 198, 201 (9th Cir. 1988),* cert. denied, *490 U.S. 1081 (1989),* and was repeated in *Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991),* and *ITSI TV Productions, Inc. v. Agricultural Associations, 3 F.3d 1289 (9th Cir. 1993).* The listed factors are:

> [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

*Id. at 1292.* The majority here agrees that factor [2] favors immunity; the University has long been recognized as performing functions of the central government. The majority states, however, that factors [3], [4], and [5] work against immunity, because the University may sue or be sued, may take property in its own name, and enjoys corporate status. But none of these three attributes of the University of California has changed since we held it to be entitled to Eleventh Amendment immunity. Once we have decided that the University is an arm of the Government of California for Eleventh Amendment purposes, the role that these structural factors play should be put to rest.

The crux of the majority's decision, as its opinion states, lies in the first factor. "The source from which the sums sought by the plaintiff must come is the most important single factor in



determining whether the Eleventh Amendment bars federal jurisdiction." *Rutledge v. Arizona Bd. of Regents, 660 F.2d 1345, 1349 (9th Cir. 1981),* aff'd sub nom. *Kush v. Rutledge, 460 U.S. 719, 75 L. Ed. 2d 413, 103 S. Ct. 1483 (1983).* In my view, however, this factor must be viewed as a legal, not an economic matter. "The question is whether the state treasury is legally obligated." *Durning, 950 F.2d at 1425 n.3.*

No one has disputed that a judgment against the University of California is a legal obligation of the State of California. The majority opinion concludes, however, that the agreement of the United States to "indemnify and hold the University harmless against any . . . judgment or liability" arising out of its management of the Laboratory changes the Eleventh Amendment analysis. But that contractual clause is a separate matter. A judgment in this case will be a legal liability of the State of California. The fact that California has a legal means of collecting an indemnity from the United States does not affect its primary liability for the judgment. Doe, if he wins his case, must execute his judgment against the State, not the United States.

Several of our decisions establish that Eleventh Amendment immunity turns on the formal legal liability of the State, and not the economic impact of the judgment. In *Markowitz v. United States, 650 F.2d 205, 206 (9th Cir. 1981),* we held that a State was entitled to Eleventh Amendment immunity even if it had liability insurance that would ultimately pay the judgment. It is true that part of our reasoning was that state funds pay the insurance premiums, id., but the same indirect economic consequences are present here. If the United States did not agree to indemnify the University, the University's charge for managing the Laboratory would have to be higher. Lower receipts by the University are a form of insurance premium payment to the United States.

Conversely, the fact that a State volunteers to pay a judgment incurred by an agency does not create Eleventh Amendment immunity because the question is whether the state has a legal

liability to pay the judgment. *Durning, 950 F.2d at 1425, n.3.* Indeed, a suit against an individual officer does not become a suit against the State for Eleventh Amendment purposes even if a state statute provides that the officer may sue the State to recover indemnity. *Blaylock v. Schwinden, 862 F.2d 1352, 1353-54 (9th Cir. 1988); Demery v. Kupperman, 735 F.2d 1139, 1147-48 (9th Cir. 1984),* cert. denied, *469 U.S. 1127 (1985).* The question is not who pays in the end; it is who is legally obligated to pay the judgment that is being sought. Here it is the State.

One difficulty with taking the federal indemnity agreement into account is that it is a judicial exercise that has no natural boundary. In deciding the threshold question of Eleventh Amendment immunity, we can determine from the pleadings before us and the state statutes whether the judgment that is sought would run against the State. It is far more difficult to determine whether the State, after such a judgment was rendered against it, would have rights of action against third parties that might lead it eventually to recoup the judgment. In this case, there is a relatively clear indemnity agreement, but does the United States have any defenses to a claim of indemnity? In the next case the State might not have the benefit of an indemnity agreement, but might have a common-law cause of action against a third party. Must we assess the State's likelihood of success in order to decide the Eleventh Amendment question?

I would avoid all of these difficulties, first, by relying on our established precedent holding that the University of California is entitled to Eleventh Amendment immunity. If I failed in that approach, I would hold that the first Mitchell factor rendered the University immune, because the judgment sought against it would be a legal liability of the State. The University officials being sued in their official capacity would then share in the Eleventh Amendment immunity of the State. *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).* The result would be to affirm the judgment of the district court that the Eleventh Amendment bars it from entertaining this action.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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| DR JOHN DOE, PHD.<br><br>Plaintiff,<br><br>vs<br><br>UNIVERSITY OF CALIFORNIA, et al.,<br><br>Defendants. | ) | C 92-2284 SAW<br><br>JUDGMENT |

Filed September 13, 1993

In accordance with the *Memorandum and Order* of September 2, 1993,

IT IS HEREBY ADJUDGED that Plaintiff's claim for breach of contract against Defendant University of California and Plaintiff's claim under 42 U.S.C. Section 1983 against Defendant John Nuckolls in his official capacity are dismissed.

September 13, 1993

/s/ Stanley A. Weigel
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| DR. JOHN DOE, Ph.D., and all others similarly situated, | ) | |
| Plaintiffs, | ) | |
| | ) | No. C-92-2284 SAW |
| vs. | ) | |
| UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS, | ) | |

Decided and Filed September 2, 1993

**MEMORANDUM AND ORDER**

## I. BACKGROUND

Plaintiff Dr. John Doe is a mathematical physicist who alleges that he was offered and accepted a position as a physicist with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because LLNL and its personnel concluded that Doe could not obtain a Department of Energy security clearance — a requirement for employment with LLNL.

Based on the foregoing allegations, on April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-



action complaint against Defendants for breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim").[1] On June 23, 1993, upon motion by Defendants, the Court dismissed Plaintiffs' Section 1983 claim against Defendants University of California ("UC") and LLNL, and Doe's Section 1983 claim against John Nuckolls in his official capacity. The Court further dismissed Plaintiffs' breach of contract claim against UC and LLNL.

Doe moves to certify for appeal, under Fed. R. Civ. P. 54(b), two of the dismissed claims: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In the alternative, Doe moves to certify for appeal these claims under 28 U.S.C. § 1292(b). Doe further moves to stay all proceedings pending the appeal. Defendants oppose the motions for certification.

## II. DISCUSSION

### A. Motion for Certification Under Rule 54(b)

As noted above, Doe seeks to appeal two claims dismissed in the Court's June 23, 1993 Memorandum and Order: (1) Plaintiffs' breach of contract claim against UC; and (2) Doe's Section 1983 claim against Nuckolls in his official capacity. In order to do so, Doe seeks a final judgment on these claims pursuant to Federal Rule of Civil Procedure 54(b).

The district court has broad discretion to enter final judgment of particular claims under Rule 54(b) and to facilitate an appeal of those claims if there is no just reason for delaying the appeal. Fed. R. Civ. P. 54(b); *see also Texaco, Inc. v. Ponsdolt*, 939

[1] Doe voluntarily dismissed the original complaint, filed June 17, 1992. On February 5, 1993, the Court dismissed in most respects Doe's first amended complaint. On March 25, 1993, the Court granted Doe's motion to file the second amended complaint.

F.2d 794, 798 (9th Cir. 1991). In considering a Rule 54(b) motion, the court should adopt a pragmatic approach, focusing on the severability of the dismissed claims from the remaining claims and efficient judicial administration. *Texaco*, 939 F.2d at 798; *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

Under the circumstances of this case, a Rule 54(b) final judgment of the dismissed breach of contract claim against UC and Section 1983 claim against Nuckolls in his official capacity is proper. First, the dismissed claims are severable from the remaining claims. The dismissed claim against Nuckolls in his *official* capacity is solely for *injunctive* relief. The only remaining claim brought by Doe is against Nuckolls in his *individual* capacity and only for *damages*. The dismissed claim against UC is a relatively straightforward breach of contract claim. There are no remaining claims against UC. There is a remaining claim against Nuckolls in his official capacity for injunctive relief, but that claim is brought by the class — which has yet to be certified.

Second, entering final judgment of the claim would result in efficient judicial administration. Doe has stated that he desires to remain in federal court, "but can sensibly do so only" if the federal court has jurisdiction to consider the breach of contract claim against UC. *See* Brief Supporting Motion for Stay and for Certification to Appeal 2. Presumably, if Doe loses on appeal, he will refile the complaint in state court. Therefore, by certifying the claims for appeal, the Court may be prevented from expending judicial resources in adjudicating the remaining claims, which would be rendered moot if Plaintiffs proceed in state court.

In light of the foregoing, the Court can find no just reason for delaying appeal on Plaintiffs' breach of contract claim against UC and Doe's Section 1983 claim against Nuckolls in his official capacity. Accordingly, Doe's motion to certify these claims under Rule 54(b) is granted.[2]



**B. Motion for Stay Pending Appeal**

Doe moves to stay the Court proceedings pending resolution of the certified appeal by the Ninth Circuit.

If a district court certifies claims for appeal pursuant to Rule 54(b), it should stay all proceedings on the remaining claims if the interests of efficiency and fairness are served by doing so. *See Matek v. Murat*, 638 F. Supp. 775, 784 (C.D. Cal. 1986). As noted above, it is presumed that if Plaintiffs lose on appeal, they will refile the action in state court. Accordingly, the interests of efficiency and fairness are served by staying further proceedings in this Court because the remaining claims would be rendered moot if Plaintiffs proceed in state court. Moreover, Defendants do not object to Doe's request for a stay. *See Armstrong v. A.C. & S., Inc.*, 649 F. Supp. 161, 162 (W.D. Wash. 1986) (motion for stay granted if motion unopposed). For the foregoing reasons, Doe's motion to stay is granted.

Accordingly, it is HEREBY ORDERED that:

(1) Pursuant to Federal Rule of Civil Procedure 54(b), the Clerk of the Court shall enter judgments of dismissal as to Plaintiffs' claim for breach of contract against Defendant University of California and Plaintiff Doe's claim under 42 U.S.C. § 1983 against Defendant John Nuckolls in his official capacity;

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[2] Because the Court grants Doe's motion for certification under Rule 54(b), his alternative motion for certification under 28 U.S.C. § 1292(b) is denied, as being moot.

(2) All proceedings in this action in this Court are stayed pending decision by the Ninth Circuit on the appeal of the foregoing claims; and

(3) Commencing ninety (90) days from now, Plaintiff Doe shall report to the Court the status of said appeal and shall do so every thirty (30) days thereafter.

Dated: September 2, 1993.

/s/ Stanley A. Weigel
Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| DR. JOHN DOE, Ph.D., and all others similarly situated, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. C-92-2284 SAW |
| UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE LABORATORIES, and JOHN NUCKOLLS, | ) | |

Decided June 23, 1993
Filed June 24, 1993

## MEMORANDUM AND ORDER

### I. BACKGROUND

Plaintiff Dr. John Doe, Ph.D, is a mathematical physicist who alleges that he was offered and accepted a position with Defendant Lawrence Livermore National Laboratory ("LLNL"). Doe further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because they concluded that Doe could not obtain a U.S. Department of Energy security clearance — a requirement for LLNL employment.

On April 7, 1993, Doe and "all others similarly situated" filed a second amended, class-action complaint alleging breach of contract and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"). Defendants move to dismiss the Section 1983 claim against Defendants University of California ("University"), LLNL, and John Nuckolls in his official capacity. Defendants further move to dismiss the breach of contract claim against the University and LLNL. Plaintiffs oppose the motions.

## II. DISCUSSION

### A. Motion to Dismiss Section 1983 Claim Against the University and LLNL

On February 5, 1993, the Court held that "governmental entities which are considered 'arms of the state' for Eleventh Amendment purposes are not 'persons' within the meaning of Section 1983, and are thus not subject to Section 1983 liability." (Citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989)). The Court further held that because the University and LLNL are "arms of the state" they are not subject to Section 1983 liability. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989). Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against the University and LLNL. *See* February 5, 1993 Memorandum and Order ("February 5 Order"), at 3.

Nonetheless, contrary to the Court's order, Plaintiffs appear to have again alleged, in the second amended complaint, a Section 1983 claim against the University and LLNL. For the reasons stated above, the Court must dismiss Plaintiffs' Section 1983 claim against these defendants.

### B. Motion to Dismiss Section 1983 Claim Against John Nuckolls in his Official Capacity

On February 5, 1993, the Court held that "suits against officials in their official, as opposed to individual, capacities are



not suits against 'persons' within the meaning of Section 1983," and are thus not subject to Section 1983 liability. (Citing *Will*, 491 U.S. at 70-71.) The Court further held that because Nuckolls was being sued in his official capacity, he is not subject to Section 1983 liability. Accordingly, the Court dismissed Doe's Section 1983 claim in the first amended complaint against Nuckolls in his official capacity. *See* February 5 Order, at 3.

The Court noted in footnote 7 of the February 5 Order an exception to the rule disallowing Section 1983 claims against persons acting in their official capacity — where a plaintiff seeks prospective injunctive relief. (Citing *Quern v. Jordan*, 440 U.S. 332, 337 (1978). The Court held the exception inapplicable to Nuckolls because Doe had not prayed for such relief.

Attempting to utilize the prospective injunctive relief exception, Plaintiffs filed a second amended complaint which prays for a court order requiring Nuckolls, in his official capacity, to hire Doe at LLNL in accordance with the alleged employment contract. *See* Second Amended Complaint, at 7 ¶ (5). Plaintiff further prays for a court order requiring Doe's "application for employment at the LLNL to be reconsidered without reference to his perceived eligibility for a [Department of Energy] security clearance." Second Amended Complaint, at 7 ¶ (6).

Plaintiff's attempt is not well-taken. The Court has already held that "an injunction which would require Nuckolls to employ [Doe] at LLNL is not prospective injunctive relief because such relief relates solely to an alleged past violation of federal law." *See* March 25, 1993 Memorandum and Order ("March 25 Order") at 3. (Citing *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Further, because an injunction requiring Nuckolls to reconsider Doe's application also "relates solely to an alleged past violation of federal law," it too is not prospective injunctive relief. *See Papasan*, 478 U.S. at 277-78; *Green*, 474 U.S. at 68. Accordingly, Doe's Section 1983

claim against Nuckolls in his official capacity[1] must be dismissed.[2] *See Will*, 491 U.S. at 70-71.

### C. Motion to Dismiss Breach of Contract Claim Against the University and LLNL

Defendants assert that the Eleventh Amendment bars Plaintiffs' breach of contract claim against the University and LLNL. Defendants' assertion is well-taken.

The Eleventh Amendment bars a citizen from bringing suit in federal court against their own state or "arms of the state." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1984); *Durning v. Citibank, N.A.*, 950 F.2d 1419 (9th Cir. 1991). The Eleventh Amendment does not bar such suits, however, if: (1) the state waives its immunity and consents to be sued in federal court; or (2) Congress creates a cause of action for damages against an unconsenting state. *See BV Eng'g v. University of Cal.*, 858 F.2d 1394, 1395-96 (9th Cir. 1988).

The Court has held that the University and LLNL are "arms of the state" for Eleventh Amendment purposes. *See* February 5 Order, at 3. The Court has also held that California has not waived its immunity and consented to be sued in federal court. *See* March 25 Order, at 3 n.5. Further, Plaintiffs' breach of contract claim is a state cause of action, not one which is congressionally created. Accordingly, because the Eleventh Amendment bars Plaintiffs' suit against the University and LLNL,

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[1] Because Plaintiffs' claim against Nuckolls in his individual capacity is not barred by Section 1983, it is not dismissed. *See Hafer v. Melo*, 112 S. Ct. 358 (1991).

[2] Because members of the class (other than Doe) do seek prospective injunctive relief, their Section 1983 claim against Nuckolls in his official capacity is not dismissed.



the breach of contract claim against these defendants must be dismissed. *See BV Eng'g*, 858 F.2d 1394.[3]

Accordingly, IT IS HEREBY ORDERED that:

(1) Plaintiffs' Section 1983 claim against the University and LLNL is DISMISSED with prejudice;

(2) Plaintiff Doe's Section 1983 claim against John Nuckolls in his official capacity is DISMISSED with prejudice; and

(3) Plaintiffs' breach of contract claim against the University and LLNL is DISMISSED with prejudice.

Dated: June 23, 1993.

/s/ Stanley A. Weigel
Judge

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[3] Doe requests that if the Eleventh Amendment bars Plaintiffs' claims in federal court, the Court transfer the case to state court rather than dismiss it. Doe cites no support for this request, and the Court finds no such precedent. Doe's request is accordingly denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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|---|---|---|
| DR. JOHN DOE, Ph.D., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | No. C-92-2284 SAW |
| vs. | ) | |
| | ) | |
| LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, CLARK GROSECLOSE, ROBERT PERRET, ROBERT PERKO, UNIVERSITY OF CALIFORNIA, DAVID GARDNER, | ) | |
| Defendants. | ) | |

Decided and Filed February 5, 1993

**MEMORANDUM AND ORDER**

## I. BACKGROUND

Plaintiff Dr. John Doe, PhD.,[1] is a mathematical physicist. Plaintiff alleges that he was offered, and in June of 1991, accepted, a position as a physicist at Defendant Lawrence

[1] Plaintiff asserts that he cannot sue in his own name because "to do so would cause him to be barred from essentially all professional employment."



Livermore National Laboratory ("Lab"). The Lab is operated by the University of California ("UC") under contract with the U.S. Department of Energy ("DOE").[2] The offer for employment included a salary of $6,100 per month and a requirement that Plaintiff obtain a security clearance from DOE.[3] Plaintiff further alleges that after he accepted the employment offer, Defendants attempted to withdraw the offer because the Lab and its personnel concluded that Plaintiff could not obtain a security clearance from DOE.

On October 22, 1992, Plaintiff filed his first amended complaint, alleging breach of employment contract against Defendants Lab, Nuckolls, UC, and Gardner; and violation of security regulations, under 42 U.S.C. § 1983 ("Section 1983 claim"), against Defendants Lab, Nuckolls, Groseclose, Perret, Perko, UC, and Gardner.[4] Defendants Nuckolls and Gardner move to dismiss the breach of contract claim against them on the ground that they are not parties to an employment contract with Plaintiff.[5] Defendants UC, Lab, Gardner, and Nuckolls move to

[2] Defendant John Nuckolls is Director of the Lab. Defendant David Gardner is President of UC. Defendants Clark Groseclose, Robert Perret, and Robert Perko are employed by UC at the Lab.

[3] Plaintiff asserts that the employment contract provided him a "reasonable period of time after he became an employee" of the Lab in which to obtain a security clearance. Defendants disagree, asserting that the employment offer was "conditioned upon Plaintiff's being able to obtain the requisite security clearance."

[4] Plaintiff also alleged failure to enforce security regulations against federal Defendants DOE, James Watkins (Secretary of Energy), and Richard Claytor (Assistant Secretary of Energy for Defense Programs). On November 25, 1992, the parties agreed to dismiss, with prejudice, all causes of action against the federal defendants.

[5] Plaintiff concedes that only UC may be liable for the breach of employment contract claim. Accordingly, Nuckolls and Gardner's motion to dismiss the contract claim against them is granted.

dismiss the Section 1983 claim on the ground that they are not "persons" within the meaning of 42 U.S.C. § 1983. Defendants Groseclose, Perret, Perko, and Nuckolls move to dismiss the Section 1983 claim on the grounds that it is barred by the statute of limitations and it fails to state a claim upon which relief can be granted.

## II. DISCUSSION

### A. The Meaning of "Person" Under Section 1983

Defendants Lab, UC, Nuckolls, and Gardner assert that they must be dismissed from the Section 1983 claim for relief because they are not "persons" within the meaning of 42 U.S.C. § 1983.[6]

States, and governmental entities which are considered "arms of the state" for Eleventh Amendment purposes are not "persons" within the meaning of Section 1983, and are thus not subject to Section 1983 liability. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989). UC is an arm of the state for purposes of the Eleventh Amendment. *See Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989); *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982). Accordingly, Defendants UC and Lab (an entity operated by UC) are not "persons" within the meaning of Section 1983, and Plaintiff's Section 1983 cause of action against them is dismissed.

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[6] 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.



Suits against officials in their official, as opposed to individual, capacities are not suits against "persons" within the meaning of Section 1983. *Will*, 491 U.S. at 70-71. Because Defendants Gardner and Nuckolls are being sued in their official capacities, they are not "persons" within the meaning of Section 1983 and therefore Plaintiff's Section 1983 cause of action against them in their official capacities is dismissed.[7] Because Defendant Nuckolls has also been sued in his individual capacity, Plaintiff's Section 1983 cause of action against him in this capacity is not barred under Section 1983. *See Hafer v. Melo*, 112 S.Ct. 358 (1991).

### B. Statute of Limitations Under Section 1983

Defendants Groseclose, Perret, Perko, and Nuckolls assert that the Section 1983 claims against them are barred by the statute of limitations. The statute of limitations for a Section 1983 action brought in California is one year. *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir. 1991).

Plaintiff's initial Complaint, filed June 18, 1992, alleges that Defendant Nuckolls, in his official capacity, denied Plaintiff due process and violated federal law by refusing to employ Plaintiff at the Lab in July of 1991. Plaintiff's First Amended Complaint, filed October 22, 1992 (more than one year after the actions complained of occurred), alleges the same violations against new Defendants Groseclose, Perko, and Perret, in their individual capacities, and adds Defendant Nuckolls in his individual capacity. Thus, unless the claims alleged in the First Amended Complaint "relate back" to the initial Complaint, Plaintiff's 1983 claims against these persons are time-barred.

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[7] One exception to the rule disallowing Section 1983 claims against persons sued in their official capacities is where the plaintiff seeks prospective injunctive relief. *See Quern v. Jordan*, 440 U.S. 332, 337 (1978). This exception is not applicable here, however, because Plaintiff has not prayed for such relief.

### 1. Defendants Groseclose, Perret, and Perko

Under Fed. R. Civ. P. 15(c), an amended complaint which names new parties will relate back to the date of the original complaint if three conditions are met. First, the claims asserted in the amended complaint must have "arisen out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Second, the party to be named by the amended complaint must have "received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits." Third, the party to be named by amendment "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Tafari v. Chevron Corp.*, 1992 U.S. Dist. LEXIS 19085 (N.D. Cal. 1992) (quoting Fed. R. Civ. P. 15(c)).

Plaintiff has submitted no evidence that Defendants Groseclose, Perret, or Perko knew or should have known that, but for Plaintiff's mistake concerning their identities, the initial complaint would have been brought against them. Indeed, Plaintiff has not even alleged that a mistake was made when the initial complaint was filed. Because Plaintiff has not met the third condition required by Fed. R. Civ. P. 15(c), the Section 1983 claims brought against Defendants Groseclose, Perret, and Perko in First Amendment Complaint do not relate back to the initial Complaint, and are therefore time-barred. *See Hill v. Shelander*, 924 F.2d 1370, 1376 (7th Cir. 1991) (quoting *Wood v. Worachek*, 618 F.2d 1225 (7th Cir. 1980)) ("[A] new defendant cannot normally be substituted or added by amendment after the statute of limitations has run.")

### 2. Defendant Nuckolls

Unlike Defendants Groseclose, Perret, and Perko, however, Defendant Nuckolls was named in the initial complaint. The initial complaint named Defendant Nuckolls in his official



capacity, and the First Amended Complaint merely added Nuckolls as a Defendant in his individual capacity.

According to the Advisory Committee Note to the 1991 amendments to Rule 15(c), "the rule has been revised to prevent parties against whom claims are made from taking unjust advantage of otherwise inconsequential pleading errors to sustain a limitations defense." The amendment aims to protect a plaintiff from a statute of limitations defense "where the original complaint sues the correct party but identifies him by a technically incorrect name." *Hill*, 924 F.2d at 1374 n.2. Such is the case here. Defendant Nuckolls was properly identified in the initial Complaint but was incorrectly named in his official capacity, rather than in his individual capacity. *See id.* As a Defendant in the initial Complaint, Nuckolls had notice of Plaintiff's claims against him within the limitations period. Accordingly, the Section 1983 claim brought against Defendant Nuckolls in his individual capacity relates back to the initial Complaint, and is therefore not time barred. *See id.*; *Kirk v. Cronvich*, 629 F.2d 404 (5th Cir. 1980).

### C. Failure to State a Claim Under Section 1983

A district court may dismiss a complaint or claim for relief if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Nonetheless, such motions to dismiss are disfavored and rarely granted. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1274 (9th Cir. 1986). Upon consideration of such a motion, the court must consider the pleadings in a light most favorable to plaintiff. *Love v. United States*, 871 F.2d 1488, 1491 (9th Cir. 1989).

Defendants assert that, notwithstanding a statute of limitations defense, Plaintiff's Section 1983 claims must be dismissed because they fail to state a claim upon which relief can be granted. Specifically, Defendants assert that the "right" which Plaintiff alleges he was deprived of (a DOE security clearance) is not recognized by law as a "right," citing *Department of the Navy v.*

*Egan*, 484 U.S. 518, 528 (1988) ("[N]o one has a "right" to a security clearance."). Defendants further assert that Plaintiff does not have a property interest sufficient to entitle Plaintiff to procedural due process.

Defendants' argument is not well-taken. First, Plaintiff sues not for a deprivation of a right to a security clearance, but rather alleges that he was "deprived of his constitutional right to (procedural) due process of law in the determination of his eligibility for a DOE security clearance." Plaintiff's Brief Opposing Motion to Dismiss, at 6. An analogous claim has been recognized by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, 502 (1958) ("[E]xecutive agenc[ies are not empowered] to fashion security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions without being accorded the chance to challenge effectively the evidence and testimony upon which an adverse security determination might rest.") Considering Plaintiff's allegations in a light most favorable to him, he may be able to state a cause of action based on the reasoning in *Greene*. Similarly, Plaintiff may be able to show that he is a party to a valid employment contract, and thus has a property interest sufficient to entitle him to procedural due process. *See Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1971) (university employees dismissed during the terms of their contracts have interests in continued employment which are safeguarded by due process). Accordingly, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

Accordingly, IT IS HEREBY ORDERED that:

(1) All Plaintiff's causes of action against Defendant Gardner are dismissed;

(2) Plaintiff's breach of contract cause of action against Defendant Nuckolls is dismissed;



(3) Plaintiff's Section 1983 cause of action Defendant Nuckolls in his official capacity is dismissed;

(4) Plaintiff's Section 1983 cause of action against Defendants UC, Lab, Groseclose, Perret, and Perko is dismissed;

Dated: February 5, 1993.

/s/ Stanley A. Weigel
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| JOHN DOE, Ph.D., and all others similarly situated, | ) |
| | ) No. 93-16792 |
| Plaintiffs-Appellants, | ) |
| | ) D.C. No. CV-92-02284-SAW |
| | ) Northern District of California |
| v. | ) |
| | ) |
| LAWRENCE LIVERMORE NATIONAL LABORATORY, JOHN NUCKOLLS, Director, | ) ORDER |
| Defendants, | ) |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, | ) |
| Defendant-Appellee. | ) |

Filed January 19, 1996

Before: CHOY, CANBY AND T.G. NELSON, Circuit Judges.

There having been no objection made by appellants Dr. John Doe, Ph.D., et al., to the request made by appellees John Nuckolls and the University of California that this court take judicial notice of certain excerpts from the publication entitled "The University of California Campus Financial Schedules 1991-1992", that request is hereby GRANTED.



A majority of the panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc. Judge Canby has voted to grant the petition and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Modification No. M205, Supplemental Agreement to Contract to Contract No. W-7405-ENG-48:

ARTICLE XVII, CL. 4 - GENERAL INDEMNITY (SPECIAL)

(a) DOE deems the performance of the work hereunder by the University to be essential in the interest of the common defense and security of the United States. DOE and the University recognize that, in part, this work involves unusual, unpredictable and abnormal risks.

(b) In view of these circumstances, it is agreed that all work under this contract is to be performed at the expense of the Government and that the University shall not be liable for the Government shall indemnify and hold the University harmless against any delay, failure, loss or damage, judgement or liability (including personal injuries and deaths of persons and damage to property) and any expenses in connection therewith (including costs of damages, costs and expense of litigation and claims) arising out of or connected with the work, including any loss or damage and incidental expense for any alleged liability for patent infringement or any alleged liability of any kind, and for any cause whatsoever arising out of or connected with the work. It is understood that the Government is obligated under this paragraph (b), whether or not any employee of the University is responsible therefor, unless any such delay, failure, loss, expense or damage (1) should be determined to have been caused directly by bad faith or willful misconduct on the part of some Corporate Officer or Officers of the University of California or of any person acting as Laboratory Director, (2) would ultimately be an unallowable cost under the provisions of this contract or (3) results from a contractual commitment which when incurred exceed the funds then obligated to the contract.

(c) The Government shall pay directly and discharge completely all final judgments, including assessed costs and all costs and expenses of litigation and claims, including attorney fees, entered against the University and, when requested by the University, all



claims which may be settled by agreement and approved by the Contracting Officer.

(d) The obligations of DOE under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," shall survive completion or termination of this agreement and shall be subject to the availability of funds appropriated from time to time by Congress. To the extent that funds are not available for payments under this clause, Article XVII, Clause 1, "Litigation and Claims," and Article X, Clause 6, "Special Hazards," DOE will use it best effort to obtain such funds.

(e) In the event that circumstances arise in the course of the work under this contract which could expose the University to financial liability arising from unusually hazardous or nuclear risks for which adequate protection is not provided under the terms of this contract, DOE agrees to consider in good faith a request from the University for indemnification against such risks under Public Law 85-804, in accordance with the procedures prescribed in Subpart 50.4 of the FAR and the no gain/no loss principle set forth in Article VI, Clause 2, of this contract.